

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

REPLY BRIEF FOR PETITIONER

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17698

NICOLAE MALAXA,

Petitioner,

v.

ROBERT F. KENNEDY, Attorney General
of the United States,

Respondent.

**PETITION TO REVIEW AN ORDER OF THE ACTING
DIRECTOR, OFFICE OF ALIEN PROPERTY**

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 31 1964

Mark J. Paulson
CLERK

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INDEX

| ARGUMENT: | PAGE |
|---|------|
| I. Respondent misconceives petitioner's contention at pages 14 <i>et seq.</i> of petitioner's brief that Article 27 of the Treaty of Peace with Rumania and Public Law 285, 84th Cong., 1st Sess., as latter's legislative history demonstrates and which the Director, Office of Alien Property recognized, exclude from vesting the property of natural persons of Rumanian nationality, as defined in Executive Order No. 8389, as amended, especially those who are permitted to reside within the United States and, therefore, that the Director was without authority to vest petitioner's property which should be returned to him | 1 |
| II. Since (1) petitioner has resided within the United States since September 29, 1946, whereas Mrs. Schrager-Singer did not leave Rumania until September 22, 1957, (2) petitioner's eligibility to receive his property was decided in 1947 in his favor on the ground that he was a persecutee by the Treasury Department, then in charge of foreign funds control, which unblocked all his then known property, (3) the vested property here involved belonged to petitioner, whereas Mrs. Schrager-Singer was not the owner, directly or indirectly, of the property claimed by her, (4) petitioner asserted in his notice of claim and alleged in the petition that he is not a national of Rumania whereas Mrs. Schrager-Singer did not so assert and allege, (5) in 1958 the Director, Office of Alien Property, determined petitioner to be eligible to receive his property by unblocking and not | |

| | PAGE |
|--|------|
| vesting \$7,962.00 belonging to him, and (6) Article 27 of the Treaty of Peace with Rumania and the other legal points raised here by petitioner were neither presented to nor ruled upon by the court in <i>Schrager-Singer v. Attorney General of the United States</i> , 106 U. S. App. D. C. 258, 271 F. 2d 841, that case is clearly distinguishable from the case at bar and in-applicable | 5 |
| III. The respondent overlooks that, (1) since petitioner was involuntarily in Rumania and persecuted there from on and after September 6, 1940, petitioner cannot be considered, as a matter of law, either domiciled in, or a subject, citizen or resident of Rumania within the definition of a national in Executive Order No. 8389, as amended, which Order was applied to Rumania on October 9, 1940, and (2) petitioner asserted in his notice of claim (Tr. 17) and alleged in the petition that he "is not a national of Rumania" (Pet. 9) | 9 |
| IV. The respondent's statement that petitioner has never disputed and still does not dispute, that the property was owned by a Rumanian corporation is absolutely untrue. Moreover, respondent's answer concedes petitioner's ownership of the property and in view of the pre-hearing stipulation filed herein, petitioner's ownership of the property is not an issue before the Court | 13 |
| V. The respondent's contention made <i>ad hoc</i> that the License of April 17, 1958 unblocking petitioner's \$7,962.00 and the License in or about July 1958 unblocking Butculescu's \$70,000.00 were issued in error is without merit | 15 |
| Conclusion | 16 |

TABLE OF AUTHORITIES

Cases:

| | PAGE |
|--|---------|
| <i>Kvos, Inc. v. Associated Press</i> , 299 U. S. 269, 279, 57 S. Ct. 197, 201 | 8 |
| * <i>Roboz v. Kennedy</i> , 219 F. Supp. 892 | 10 |
| <i>Schrager-Singer v. Attorney General of the United States</i> , 106 U.S.D.C. App. D. C. 258, 271 F. 2d 841 | 5, 7, 8 |
| <i>United States v. L. A. Tucker Truck Lines</i> , 344 U. S. 33, 38, 73 S. Ct. 67, 69 | 8 |
| <i>United States v. Mitchell</i> , 271 U. S. 9, 14 S. Ct. 418, 419 | 8 |
| * <i>Webster v. Fall</i> , 266 U. S. 507, 511, 45 S. Ct. 148, 149 | 8 |

Treaty, Statutes, Executive Order and Regulations:

| | |
|--|------------------|
| * Treaty of Peace with Rumania, 61 Stat. 1812, 1813-1814 | 1, 2, 3, 5, 6, 7 |
| Article 27 | 1, 2, 3, 5, 6, 7 |
| International Claims Settlement Act | 4, 11 |
| Section 202(a) | 11 |
| Section 207(a) | 11 |
| Section 207(b) | 4 |
| Public Law 285, 84th Cong., 1st Sess., 69 Stat. 564. . | 1, 2, 3, 4 |
| Public Law 671, 79th Cong., 2d Sess. | 6 |
| Section 2 | 6 |
| Trading with the Enemy Act, as amended, 50 U.S.C.A. App. 832 | 6 |
| Section 32(a) | 6 |

* Cases or authorities chiefly relied upon are marked by asterisks.

| | PAGE |
|---|------|
| Executive Order No. 8389, as amended1, 2, 9, 11, 12, 16 | |
| Regulations under Executive Order No. 8389, as amended (31 CFR § 500.85) | 16 |
| <i>Miscellaneous:</i> | |
| * H. Rep. 624, 84th Cong., 1st Sess. | 3 |

* Cases or authorities chiefly relied upon are marked by asterisks.

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ARGUMENT

I

Respondent misconceives petitioner's contention at pages 14 *et seq.* of petitioner's brief that Article 27 of the Treaty of Peace with Rumania and Public Law 285, 84th Cong., 1st Sess., as the latter's legislative history demonstrates and which the Director, Office of Alien Property recognized, exclude from vesting the property of natural persons of Rumanian nationality, as defined in Executive Order No. 8389, as amended, especially those who are permitted to reside within the United States and, therefore, that the Director was without authority to vest petitioner's property which should be returned to him.

The basic question before the Court is, as stated by the parties:

"Whether the vesting under Vesting Orders AS 166 and SA 167 was valid, under the provisions of the Act and the provisions of Article 27 of the Treaty of Peace with Rumania."

Article 27 of the Peace Treaty with Rumania states that the vesting of property belonging to Rumanian nationals at its coming into force "shall not include" the "[p]roperty of natural persons who are permitted to reside within the territory of the country in which" the property is located or to reside elsewhere in United Nations territory.

The respondent does not deny in his answer or in his brief the allegation of the petition (Pet. p. 5) that the Department of State interpreted the Treaty as applicable to those persons who, on the date of the signing of the Treaty, February 10, 1947, are permitted to sojourn within the country in which the property is located.

Public Law 285, 84th Cong., 1st Sess., approved several years later on August 9, 1955, states in Section 202(a) that the property of Rumanian nationals shall vest "[i]n accordance with * * * article 27 of the Treaty of Peace with Rumania * * *."

Thus, by the use of the words "[i]n accordance with" Article 27 of the Treaty, which obviously mean, as respondent recognizes at page 3 of his brief, "not inconsistent with", Article 27 was not affected by Public Law 285 and Congress thereby specifically expressed the legislative intention to exclude from the vesting authority the blocked property of natural persons who are Rumanian nationals, as defined in Executive Order No. 8389, as amended, permitted to reside within the United States.

Therefore, since petitioner was permitted to reside and was residing within the United States prior to February 10, 1947, Article 27 excluded the sum of \$90,006.25 belonging to petitioner from vesting and the Director was without

authority to vest the same. The vesting of this sum was in violation of the Treaty, a law of the land.

On April 17, 1958, the Director recognized that, since petitioner was residing in the United States prior to and after February 10, 1947, property belonging to him was not subject to vesting because of the exclusion in Article 27 of the Treaty by issuing a License unblocking and not vesting \$7,962.00 of his property (Tr. p. 34). Clearly, the Director on the one hand determined that property of the petitioner (\$7,962.00) was excluded from vesting by Article 27 of the Treaty and on the other hand inconsistently determined that other property belonging to the petitioner (\$90,006.25) was not excluded from vesting by Article 27 of the Treaty. Thus, the Director considered Article 27 of the Treaty applicable to one sum and not applicable to another sum, both sums belonging to and owned by the petitioner.

The legislative history, set forth at pages 15-20 of petitioner's main brief, conclusively shows that Congress intended that even the property of natural persons resident in Rumania should not be vested for, as Senator Morton stated before the Senate Committee on Foreign Relations:

"we do not wish to alienate the support of friendly nationals of * * * Rumania or impair their faith in the United States" (Pet. Br. p. 16)

and as Congressman Richards, who was in charge of the legislation, said on the floor of the House:

"[t]he property of these individuals is not confiscated. The property remains blocked and whenever in the future it is possible for the unfortunate people of * * * Rumania to enjoy the right to own private property, it is expected this property will be returned to them." (Pet. Br. p. 20)

Furthermore, H. Rep. 624, 84th Cong., 1st Sess., which accompanied the bill that became Public Law 285, pointed

out at page 3 thereof, as quoted at pages 19-20 of petitioner's main brief, that

"the following three major types of determination will have to be made:

* * * * *

"2. *Whether the property is owned by a natural person rather than a corporation or government. Assets of natural persons are not to be taken under this bill. They remain blocked. Should such assets already have been vested, they or their proceeds will be returned to blocked accounts. Thus vesting is limited to assets belonging to 1 of the 3 Governments, corporations, or other business entities.*" (Emphasis supplied.)

Manifestly, Congress clearly intended that only the property belonging to the Rumanian Government and Rumanian corporations or other business entities should be vested and that the Director should not have the authority to vest the property of natural persons, especially those residing in the United States prior to the signing of the Treaty. Section 207(b) of the International Claims Settlement Act is to be construed to carry out the Congressional intent and to avoid a consequence which Congress clearly did not intend (Pet. Br. pp. 21-22).

The legislative history of Public Law 285 confirms the express limitation on the Director's vesting power and, to the extent the statutory language may be ambiguous, clarifies it.

Indeed, the Director recognized that property of natural persons is excluded from vesting under the law when he, as the respondent admits, issued a license unblocking in favor of Nicu Butculescu a national and resident of Rumania until December 30, 1947, who did not enter the United States until 1948, approximately \$70,000.00 representing a portion of a debt of an American company owned as of September 15, 1947, directly or indirectly, by Nicu Butculescu Societe en Commandite, a Rumanian busi-

ness entity in which Butculescu had an interest (Tr. pp. 42, 49-50).

Since the vesting of the property of natural persons residing within the United States prior to February 10, 1947, was excluded by Article 27 of the Treaty and, since Congress expressly intended that the property of natural persons shall not be vested, the Director was without authority to vest petitioner's property and, therefore, he should be directed to return petitioner's property to him.

II

Since (1) petitioner has resided within the United States since September 29, 1946, whereas Mrs. Schrager-Singer did not leave Rumania until September 22, 1957, (2) petitioner's eligibility to receive his property was decided in 1947 in his favor on the ground that he was a persecutee by the Treasury Department, then in charge of foreign funds control, which unblocked all his then known property, (3) the vested property here involved belonged to petitioner, whereas Mrs. Schrager-Singer was not the owner, directly or indirectly, of the property claimed by her, (4) petitioner asserted in his notice of claim and alleged in the petition that he is not a national of Rumania whereas Mrs. Schrager-Singer did not so assert and allege, (5) in 1958 the Director, Office of Alien Property, determined petitioner to be eligible to receive his property by unblocking and not vesting \$7,962.00 belonging to him, and (6) Article 27 of the Treaty of Peace with Rumania and the other legal points raised here by petitioner were neither presented to nor ruled upon by the court in *Schrager-Singer v. Attorney General of the United States*, 106 U. S. App. D. C. 258, 271 F. 2d 841, that case is clearly distinguishable from the case at bar and inapplicable.

Petitioner has resided within the United States since September 29, 1946. Mrs. Schrager-Singer was not a resi-

dent of the United States prior to February 10, 1947, for as stated in the footnote at page 260 of 106 U. S. App. D. C. and page 843 of 271 F. 2d, she "left that country [Rumania] September 22, 1957", more than ten years after the Treaty was signed. She was, therefore, not entitled to the benefit of Article 27 of the Treaty.

In April, 1947, the Treasury Department, then in charge of foreign funds control, determined that petitioner is eligible to receive his property by unblocking all his then known property upon the ground that he was a persecutee whose property it was the policy of the Treasury Department to unblock in view of Section 2 of Public Law 671, 79th Cong., 2d Sess.¹ This is manifest from the letter of John S. Richards, Director, Foreign Funds Control, Treasury Department, dated May 6, 1947 to petitioner's then attorneys reading, in pertinent part, as follows (Tr. p. 16):

E. Fehle, Mann etc
 "Receipt is acknowledged of your letter of May 5, 1947, with respect to License No. NY-834337-T, dated April 28, 1947, unblocking the funds on deposit with Chase National Bank in the names of N. Malaxa—S.A.R. and N. Malaxa—Uzine de Tuburi si Otelarii, Romanian corporations.

"This will confirm your understanding that this Department unblocked such funds because it was represented by Mr. Nicolae Malaxa, the applicant, and it appeared from the documents filed in support of the application, that such funds were beneficially owned by Mr. Malaxa, who, as an individual, is among a class of persons whose property it is the present policy of the Treasury to unblock, in view of Section 2 of Public Law 671, 79th Cong., 2nd Sess."

¹ Public Law 671, 79th Cong., 2d Sess., is Section 32(a) of the Trading with the Enemy Act, as amended, 50 U. S. C. A. Appendix, § 32.

Mrs. Schrager-Singer was not even the beneficial owner of the property claimed by her for this court pointed out at the end of the opinion in her case that "no part of the vested bank account could have been given to her had she not been a Rumanian national" since she was not its owner "directly or indirectly".

Here, the petitioner was the direct beneficial owner of the property at all times prior to the vesting for, as alleged in the petition (Pet. p. 3), and not denied by the respondent in his answer or brief, the petitioner used his wholly-owned corporation as a cloak in the acquisition of the vested sum for himself.

The petitioner asserted in his notice of claim (Tr. p. 17) and alleged in the petition (Pet. p. 9) that he is not a national of Rumania. Mrs. Schrager-Singer did not assert in her notice of claim and did not allege that she is not a national of Rumania.

The Director Office of Alien Property, determined on April 17, 1958 that petitioner is eligible for the return of vested property by unblocking and not vesting \$7,962.00 belonging to petitioner. No determination of eligibility of Mrs. Schrager-Singer was ever made.

Surely, the circumstances in the case at bar are substantially different from the circumstances in the *Schrager-Singer* case.

Furthermore, there was not presented to nor discussed by the court in *Schrager-Singer* the pertinent provisions of Article 27 of the Treaty of Peace with Rumania and the intention of Congress not to vest the property of natural persons, especially the property of natural persons who are permitted to reside within the United States on February 10, 1947, the date when the Treaty was signed.

It is a well-settled rule that where a certain point of law is not brought to the view of the court in determining

a case, the decision is not a precedent calling for the same decision in a similar case in which the point is brought before the court.

In *Webster v. Fall*, 266 U. S. 507, 511, 45 S. Ct. 148, 149, the Court said:

"The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

In *United States v. Mitchell*, 271 U. S. 9, 14, 46 S. Ct. 418, 419, the Court said:

"* * * That question was not presented to the court for decision, and no such question was considered or decided. It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered. *Webster v. Fall*, 266 U. S. 507, 511."

To the same effect:

United States v. L. A. Tucker Truck Lines, 344 U. S. 33, 38, 73 S. Ct. 67, 69;
Kvos, Inc. v. Associated Press, 299 U. S. 269, 279, 57 S. Ct. 197, 201.

In view of the foregoing, the *Schrager-Singer* case is not only distinguishable from the case at bar but, also, not a precedent.

III

The respondent overlooks that, (1) since petitioner was involuntarily in Rumania and persecuted there from on and after September 6, 1940, petitioner cannot be considered, as a matter of law, either domiciled in, or a subject, citizen or resident of Rumania within the definition of a national in Executive Order No. 8389, as amended, which Order was applied to Rumania on October 9, 1940, and (2) petitioner asserted in his notice of claim (Tr. 17) and alleged in the petition that he "is not a national of Rumania" (Pet. 9).

The respondent contends that petitioner was a citizen and resident of Rumania on October 9, 1940, and, therefore, admits that he is a national of Rumania as defined in Executive Order No. 8389, as amended, which was applied to that country on October 9, 1940.

But the respondent overlooks that petitioner was involuntarily in Rumania and persecuted there from on and after September 6, 1940.

In the Supplement to Schedule 9A(d) and (e) to his Notice of Claim, petitioner stated the following (Tr. 12):

"Upon the departure of King Carol II from Rumania on or about September 6, 1940, the Nazi controlled Government of General Antonescu and the Iron Guard usurped the management of my properties. From that time on I was continuously and relentlessly persecuted by the authorities serving the Axis cause. I was under police surveillance day and night, and was prevented from taking decisions on matters of business. On January 23, 1941 I was arrested and imprisoned. My industrial plants were confiscated and turned over to the Germans to be made part of the Hermann Goering Werke. I was singled out for such

persecution, and my industrial plants were the only ones in Rumania which were seized by the Nazis. Among the confiscated assets were those of N. Malaxa S.A.R. in Rumania. After I was released from imprisonment, I *continued to be under strict police control and surveillance*. Since my businesses were confiscated as stated above, *I was unable to work*.

"After the forced departure of the Germans, the Russians seized the tube plant of mine, dismantled it and shipped it to Russia, to my knowledge the only instance of such confiscation at that time.

"It was only after World War II, and after the arrival of the American Military Mission in Bucarest, and as a result of it, that some of my properties were restored. These various companies were doing business while the American Military Mission was there, and until my departure from Rumania on June 17, 1946." (Emphasis supplied.)

In the Supplement to Schedule 9A(i) to his Notice of Claim, petitioner stated (Tr. 17):

"Claimant was physically in Rumania from October 9, 1940 until June 17, 1946, as stated in Supplement to Schedule 9A(d) and (e). He was persecuted at all pertinent times. He was able to leave Rumania on June 17, 1946, and has resided in the United States since September 29, 1946. On April 28, 1947, the U. S. Government unblocked to claimant all the known assets standing either in his name or in the name of his companies, including N. Malaxa S.A.R.

"As a result of the above facts, and the operating effects of General License No. 94 (8 C.F.R. 511.194), *claimant is not a national of Rumania*." (Emphasis supplied.)

In *Roboz v. Kennedy*, 219 F. Supp. 892, plaintiffs sued in the District Court pursuant to Section 207(a) of the

International Claims Settlement Act for the return of property vested under Section 202(a). It appeared that plaintiffs, who arrived in the United States in 1947, were unable to leave Hungary before March 13, 1941, the date Executive Order 8389 was applied to Hungary, their family business property was confiscated, and they had lost their home and civil and voting rights. The defendant moved to dismiss the complaint for lack of jurisdiction on the ground that the plaintiffs are "nationals" of Hungary within the meaning of Executive Order 8389. Judge Youngdahl, in denying the motion, held that the plaintiffs were not domiciled in, or subjects, citizens or residents of Hungary, within the Executive Order defining nationals, and thus were entitled to sue for the vested property. Judge Youngdahl said, at page 894:

"Given these facts, were plaintiffs 'domiciled in, or a subject, citizen or resident of' Hungary within the meaning and purpose of the International Claims Settlement Act? All of the words in that definition imply some reciprocal duties and obligations between the person and the country.

* * * * *

"they lost their home, they had no rights in law, they could not vote. Clearly, they were involuntarily in Hungary. They therefore cannot be considered either domiciled in, or subjects, citizens or residents of Hungary for purposes of a suit under 22 U.S.C. § 1631 f(a). Congress could not have intended so inequitable a result, and Congress has specified that, in proceedings under this section, this Court sits as a court 'in equity.' Ibid.

* * * * *

" "[R]esident within the territory" * * * connotes something different from and more than living within the specified areas. It is rather indicative of a settled and permanent place of abode, volitionally ac-

quired and voluntarily assumed. * * * McGrath v. Zander, 85 U. S. App. D. C. at 337, 177 F. 2d at 652. 'Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes.' Guessefeldt, 342 U. S. at 319, 72 S. Ct. at 344, 96 L. Ed 342."

This decision is clearly applicable here.

The petitioner was "continuously and relentlessly persecuted by the authorities serving the Axis cause" and "under police surveillance day and night" from September 9, 1940, prior to the operative date, October 9, 1940, "arrested and imprisoned" on January 23, 1941, and "under strict police control and surveillance" after his release from imprisonment. His industrial plants, including those of N. Malaxa S.A.R., were confiscated and turned over to the Germans. He was "unable to work". It was not until June 17, 1946 that he was able to leave Rumania for the United States where he arrived on September 29, 1946 and has resided ever since.

Petitioner was therefore involuntarily in Rumania and cannot be considered either domiciled in, or a subject, citizen or resident of Rumania within Executive Order No. 8389, as amended.

Indeed, the petitioner asserted in his Notice of Claim (Tr. 17) and alleged in the petition that he "is not a national of Rumania" (Pet. 9), which allegation is not denied by respondent's answer.

IV

The respondent's statement that petitioner has never disputed, and still does not dispute, that the property was owned by a Rumanian corporation is absolutely untrue. Moreover, respondent's answer concedes petitioner's ownership of the property and, in view of the pre-hearing stipulation filed herein, petitioner's ownership of the property is not an issue before the Court.

Respondent's brief states, at page 4, that petitioner "has never disputed, and still does not dispute, that the property in question was owned by a Rumanian corporation * * * particularly when the said property was vested."

This statement is not true.

On page 2 of petitioner's Notice of Claim for Return of Property (Tr. 2) the following is found:

"10. * * *

(b) Check the one of the following statements which applies to your claim:

X (1) The claimant was the owner of the property on the vesting date."

In the supplement to Items 11(c) and (d) of his Notice of Claim (Tr. 3) petitioner stated:

"10. I again state that the sum of \$90,006.25 which was acquired through these transactions was acquired by me with my own personal funds in Roumania and I further state that although this sum so acquired was deposited to the credit of the Malaxa Corporation's account, such sum never appeared on the books of the Malaxa Corporation for the reason that I merely used this corporation to camouflage my own dollars." (Tr. 28-29)

* * * * *

"18. . . . I also attach the following:

.

(b) Affidavit of Sacha Liber Silib Roman, sworn to January 12, 1959 (Exhibit XIII), former legal adviser to the British Legation in Roumania and my principal legal adviser in Roumania and of the Malaxa Corporation, who avers that he was fully informed of all the intimate operations of both myself and my companies, that the sum of \$90,227.26, which includes the vested property, was without doubt owned by me exclusively and that this amount had never been the property of the Malaxa Corporation, although standing in its name."

.

"19. The above evidences that the vested sum is my personal property. That such sum has never been the property of the Malaxa Corporation is evidenced by the following (Tr. 34-35):

.

"(i) As all the assets of a corporation must be shown in its books and as the \$90,006.25 were not shown in the company's books, they do not belong and at no time belonged to the Malaxa Corporation." (Tr. 39)

It is evident from the foregoing that respondent's counsel have not carefully read the transcript of the record.

Furthermore, petitioner states at the bottom of page 2 and top of page 3 of his main brief that he used the corpo-

ration as a cloak in his acquisition of the dollars for himself and prior to and at date of the vesting of the \$90,006.25 was the owner thereof, and that in his Notice of Claim he stated he was the owner of the property on the vesting date and the corporation was not the owner.

Respondent has failed to recognize that in his answer he conceded that petitioner was the owner of the property for he there did not deny the allegation in the petition that petitioner was the owner and stated:

"His property was legally and property vested * * *"
(Answer 9)

* * * * *

"1. *Petitioner's property was vested * * **" (Answer 10)

"2. *Vesting of petitioner's property did not violate the Fifth Amendment to the Constitution.*"
(Answer 13)

However, in view of the pre-hearing stipulation, signed by the respondent's counsel and filed herein, which sets forth the questions presented, the petitioner's ownership of the property is not an issue before the Court.

V

The respondent's contention made *ad hoc* that the License of April 17, 1958 unblocking petitioner's \$7,962.00 and the License in or about July 1958 unblocking Butculescu's \$70,000.00 were issued in error, is without merit.

Recognizing that the License unblocking petitioner's \$7,962.00 and the License unblocking Butculescu's \$70,000. are precedents for the allowance of petitioner's claim, the respondent attempts to avoid this effect by contending at page 8 of his brief that these licenses were issued in error.

But during the entire period of more than 6 years since he issued these Licenses the Director never claimed that they were erroneously issued. Moreover, he never revoked them, although they could have been "revoked at any time" as provided in the Regulations issued under Executive Order No. 8389 (31 CFR § 500.85). Now, for the first time, this contention is made by the respondent *ad hoc*. Surely, the contention is without merit.

CONCLUSION²

Judgment should be entered setting aside the Acting Director's Order of January 23, 1963 and directing that the vested sum of \$90,006.25 be returned to petitioner and for such further relief in favor of the petitioner as to the Court may seem just and proper.

Respectfully submitted,

NICOLAE MALAXA,
Petitioner *pro se*.

² This reply brief does not contain an analysis of the documents requested by petitioner's motion of January 21, 1963.